

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:12-HC-2316-H-JG

UNITED STATES OF AMERICA

v.

MICHAEL W. MCBRIDE

RESPONDENT'S EXPEDITED MOTION
FOR AN IMMEDIATE PROBABLE
CAUSE HEARING AND AN
EXPEDITED MERITS HEARING

Mr. McBride respectfully moves this Court for an immediate probable cause hearing to determine whether the government can make its case against Mr. McBride. Further, Mr. McBride respectfully moves this Court for a hearing on the merits of this case as soon as possible, but no later than February 4, 2013 for the reasons outlined below.

Facts

This is the second time that the United States has certified Respondent Mr. Michael McBride. On October 27, 2011, the United States certified him as a sexually dangerous person. (E.D.N.C. Case No. 5:11-HC-02210-BO.) After conducting discovery, the parties agreed that Mr. McBride did not meet the criteria for commitment. Specifically, the government agreed that it could not prove its case by clear and convincing evidence, after its outside expert, Dr. Dale Arnold, concluded that Mr. McBride did not meet criteria for commitment. Accordingly, the government moved to dismiss the case with prejudice. (E.D.N.C. Case No. 5:11-HC-02210-BO, DE 21.) On May 17, 2012, Judge Boyle granted the government's motion and dismissed the case with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2). (E.D.N.C. Case No.

5:11-HC-02210-BO, DE 27.)

As reflected in the attached settlement agreement from the prior case (E.D.N.C. Case No. 5:11-HC-02210-BO DE 21, DE 28, Attachment A), the parties agreed that, as of May 17, 2012, Mr. McBride would not have serious difficulty in refraining from sexually violent conduct or child molestation if released and therefore did not meet the third requirement necessary for commitment.

After the dismissal, Mr. McBride was released to his lifetime term of supervised release in New Hampshire. (D.N.H Case No. 1:09-CR-00119-PB-1.) On August 3, 2012, the Probation Office petitioned to revoke his supervised release for a violation of halfway house rules. (Attachment B). Notably, this petition was NOT based on any allegations of sexual misconduct or failure to comply with obligations of sex-offender treatment. Instead, Mr. McBride did not observe the rules of the halfway house where he resided. Mr. McBride admitted to the violation of conditions. On November 12, 2012, the New Hampshire District Court revoked his supervised release and sentenced him to five-months imprisonment. When released, Mr. McBride will continue to serve his lifetime term of supervised release.

The United States shuffled Mr. McBride down to Butner and on December 21, 2012, ten days before his release date from BOP,¹ certified him as allegedly sexually dangerous person. The present certificate is substantially similar to the certificate that the government voluntarily dismissed with prejudice in May of 2012. The original certificate alleges:

A review and assessment of him using an actuarial risk assessment instrument (Static-99R) was conducted. This result, in addition to his prior offense conduct,

¹ But for the filing of this certificate, Mr. McBride was due to be released on December 31, 2012.

significant negative social influences, intimacy deficits, poor general self-regulation, and poor sexual self-regulation, indicate he will have serious difficulty refraining from sexually violent conduct or child molestation if released.

(E.D.N.C. Case 5:11-hc-02210-BO, DE 1-1 at 2 (10/27/11.))

The present certificate alleges:

A review and assessment of him using an actuarial risk assessment instrument (Static-99R) was conducted. This result, in addition to his prior offense conduct, **failure to cooperate with supervision**, significant negative social influences, intimacy deficits, poor general self-regulation, and poor sexual self-regulation, indicate he will have serious difficulty refraining from sexually violent conduct or child molestation if released.

(E.D.N.C. Case 5:12-hc-02316-H-JG, DE 1-2 at 2 (12/21/12) (emphasis added).)

Argument and Request for Relief

The government is estopped from arguing that, as of May 17, 2012 (the date of the dismissal with prejudice of the first certificate), Mr. McBride met the criteria for commitment. “Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.” *Montana v. United States*, 440 U.S. 147, 153 (1979); *see also Westmoreland Coal Co. v. Sharpe*, 692 F.3d 317, 331 (4th Cir. 2012) (enumerating test for collateral estoppel). A dismissal with prejudice is a final judgment for purposes of collateral estoppel. *Brooks-Ngwenya v. Indianapolis Pub. Schs.*, 564 F.3d 804, 809 (7th Cir. 2009).

Therefore, the government must base Mr. McBride’s commitment on factual changes that have occurred since May of 2012. Based on the current certificate, it appears that the government intends to commit Mr. McBride based on his failure to abide by halfway house rules.

With due respect to the government, it seems very unlikely that the government will be able to prove by clear and convincing evidence that Mr. McBride became a sexually dangerous person between May of 2012 and today because the facts of his case have not materially changed in the last eight months. However, Mr. McBride's liberty is currently being restricted because he sits in BOP, held only by the certificate in this case. And he will remain there until this case is resolved.

Accordingly, Mr. McBride respectfully moves this Court for an immediate probable cause hearing to determine whether the government can make its case against Mr. McBride. Further, Mr. McBride respectfully moves this Court for a hearing on the merits of this case as soon as possible, but no later than February 4, 2013.² This date is 45 days after the date the government filed the certificate. This period of time is reasonable for the government to bring its case against Mr. McBride for the reasons discussed below. In addition, see *United States v. Timms*, 799 F. Supp. 2d 582, 595-96 (E.D.N.C. 2011) for a discussion and collection of cases about what time periods due process allows for pre-hearing deprivations.³

As the Fourth Circuit has recognized, the filing a certificate in a § 4248 case deprives Mr.

² Mr. McBride accordingly argues that following the standing order in this case would amount to a due-process violation.

³ The actual finding of a due process violation in *Timms* was overruled by the Fourth Circuit because of the "unique" circumstances of that case, "including a new statute with debatable constitutionality; a properly filed Government certification followed by the district court's *sua sponte* placement of the case in abeyance; Timms' failure to request a hearing earlier in this action; an unusually lengthy appellate resolution of the constitutionality of the statute; the burdens associated with the consolidation of § 4248 commitment actions into one judicial district; and the time necessary to prepare for a § 4248 commitment hearing." *United States v. Timms*, 664 F.3d 436, 455 (4th Cir. 2012). Mr. McBride's case clearly presents a different set of circumstances.

McBride of a protected liberty interest and triggers the Due Process Clause. *United States v. Timms*, 664 F.3d 436, 451-52 (4th Cir. 2012). Determining how quickly due process demands a hearing involves weighing (1) the importance of the respondent's interest, (2) the likelihood that the certificate was filed incorrectly, and (3) the justification offered by the government for any delay in the hearing. *Id.* at 451 (quoting various Supreme Court cases). In discussing this test, the Fourth Circuit specifically noted that the risk of erroneous deprivations of liberty is high in these cases because of the lack of procedural safeguards in the statute and because the United States Attorney's Office for the Eastern District of North Carolina had filed almost two dozen certifications that it later decided were erroneous. *Id.* at 452.

There has already been a judicial order concerning this matter that has preclusive effect and limits the ability of the parties to contest matters in this case prior to May of 2012. And the parties have already conducted extensive discovery in this case and had Mr. McBride evaluated during his first certification. No justification exists, therefore, for a lengthy process of discovery and evaluations in this case. In the prior proceeding, the parties exchanged substantial discovery (which was reproduced in this second proceeding) and fully developed the factual record. Given the preclusive effect of the prior judgment, the actual period of time in dispute in this case is less than a year. Effectively, the parties will contest whether the government can prove by clear and convincing evidence that Mr. McBride became a sexually dangerous person over the last eight months.

Therefore, using the balancing test discussed by the Fourth Circuit, (1) Mr. McBride has a paramount interest in his liberty, (2) the risk that the certificate filed in this case will not support commitment is high, and (3) the government has no reason to delay this hearing, considering the

main obstacle to a prompt hearing—discovery—has already been done and that the actual dispute in this case is so temporally limited. “[T]he fundamental requirement of due process is to be heard at a meaningful time and in a meaningful manner.” *Id.* at 450 (internal quotation omitted). In this case, that fundamental requirement demands an immediate probable cause hearing⁴ and a speedy hearing on the merits—measured in weeks, not months.

Respectfully submitted this 15th day of January, 2013.

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⁴ Mr. McBride notes that the United States has told the Fourth Circuit that it will not oppose respondents’ requests for probable cause hearings in § 4248 cases. *Timms*, 664 F.3d at 452.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served upon:

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by electronically filing the foregoing with the Clerk of Court on January 15, 2013 using the CM/ECF system which will send notification of such filing to the above.

This the 15th day of January, 2013.

/s/ Katherine Shea

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